No. 83, Original

In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF MARYLAND, ET AL., PLAINTIFFS

v.

STATE OF LOUISIANA

ON MOTION FOR LEAVE TO FILE COMPLAINT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

ROBERT R. NORDHAUS
General Counsel

HOWARD E. SHAPIRO
Solicitor
Federal Energy Regulatory Commission
Washington, D.C. 20426

INDEX

	Page
Jurisdiction	1
Question presented	2
Constitutional Provisions and Statutes involved	2
The interest of the United States and the Federal Energy Regulatory Commission	3
Statement	4
Discussion	8
1. The plaintiff States have standing	8
2. This case is appropriate for the exercise of original jurisdiction	10
Conclusion	15

CITATIONS

Cases:

Arizona v. *New Mexico*, 425 U.S. 794	10
Arizona Public Service Co. v. *Snead*, No. 77-1810 (April 19, 1979)	10
Babbitt, Gov. of Arizona v. *United States*, No. 78-225 (June 5, 1979)	13
Doremus v. *Board of Education*, 342 U.S. 429	12
Edwards v. *Parker*, 332 So.2d 175	12
Federal Power Commission v. *Hunt*, 376 U.S. 515	14
Federal Power Commission v. *Tennessee Gas Transmission Co.*, 371 U.S. 145	14
Gulf Oxygen Welder's Supply Profit Sharing Plan and Trust Agreement, In re, 297 So.2d 663	12

Cases—Continued Page

Hawaii v. *Standard Oil Co.*, 405 U.S. 251 8
Louisiana v. *Board of Supervisors*, 84 So.2d 597 12
Muskrat v. *United States*, 219 U.S. 346.. 13
Pennsylvania v. *New Jersey*, 426 U.S. 660 ..... 8, 19
Pennsylvania v. *West Virginia*, 262 U.S. 553 ..... 9, 14
Petition of Sewerage and Water Board of New Orleans, 177 So. 2d 276 12

Constitution, statutes and regulations:

United States Constitution:

Article I, Section 8, clause 3 ("Commerce Clause") 2, 13
Article I, Section 10, clause 1 ("Contract Clause") 2
Article I, Section 10, clause 2 ("Import-Export Clause") 2
Article III, Section 2 2
Article VI, Clause 2 ("Supremacy Clause") 2, 10

Natural Gas Act of 1938, ch. 556, 52 Stat. 821-833, 15 U.S.C. 717-717w 4
Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 4
Tax Reform Act of 1976, Pub. L. No. 94-455, Section 2121(a), 90 Stat. 1914, 15 U.S.C. 391 10
26 U.S.C. 7421 11
28 U.S.C. 1251(a)(1) 2
43 U.S.C. 1331-1343 3

Constitution, statutes and regulations—Continued — Page

Act 294, 1978 La. Sess. Law Serv. 482 (West) 4
La. Rev. Stat. Ann. (West):
§ 46:1303(E) 6
§ 47:1305(B) 11
§ 47:1575 7
§ 47:1576 7
§§ 47:1301-47:1307 4

Miscellaneous:

43 Fed. Reg. 45553 (1978) 7
43 Fed. Reg. 60438 (1978) 7
44 Fed. Reg. 13460 (1979) 7

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND, ET AL., PLAINTIFFS

v.

STATE OF LOUISIANA

ON MOTION FOR LEAVE TO FILE COMPLAINT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

This brief is filed pursuant to Rule 42(4) of this Court's Rules on behalf of the United States and the Federal Energy Regulatory Commission in support of Plaintiffs' motion for leave to file complaint.

JURISDICTION

Plaintiffs seek to invoke the original jurisdiction of this Court pursuant to the Constitution of the United States, Article III, Section 2, clauses 1 and 2, and 28 U.S.C. 1251(a)(1).

QUESTION PRESENTED

Whether this Court should exercise its original jurisdiction over a complaint filed against the State of Louisiana by eight States that consume natural gas, alleging that the Louisiana First Use Tax on gas from the Outer Continental Shelf and imported gas, is unconstitutional.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, clause 3 ("Commerce Clause"), Article I, Section 10, clause 1 ("Contract Clause") and clause 2 ("Import-Export Clause"), and Article VI, clause 2 ("Supremacy Clause") of the Constitution are set forth in Plaintiffs' Brief in Support of Motion for Leave to File Complaint, at 2-3. Article III, Section 2 of the Constitution provides in relevant part:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction.

28 U.S.C. 1251(a)(1) provides:

> (a) The Supreme Court shall have original and exclusive jurisdiction of:
>
> > (1) All controversies between two or more states: * * *

The relevant provisions of the Louisiana First Use Tax and related statutes are set forth in Exhibits

A and B to the motion for leave to file complaint and the complaint, in the appendix to Plaintiff's brief in support thereof.

THE INTEREST OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION

Plaintiff States seek leave to file an original complaint challenging a tax of seven cents per thousand cubic feet ("Mcf") imposed by the State of Louisiana on the first "use" of natural gas originating outside of that state that is being moved in interstate commerce. The principle impact of the tax is on gas produced from federally leased areas on the Outer Continental Shelf ("OCS gas"), and on gas imported from abroad. Because first "use" is defined so broadly as to include even the measurement of gas flowing in interstate commerce, the tax will add at least $225 million a year to the cost of gas used by consumers in other states.

As a consumer of natural gas in the operation of military and civilian installations, the United States is directly affected by these additional costs. As lessor of gas producing acreage on the Outer Continental Shelf (43 U.S.C. 1331-1343) and as responsible under the Constitution for the regulation of interstate and foreign commerce, and for the imposition of any duties on imports, the United States is directly concerned with any state tax that may improperly burden, or operate inconsistently with these functions.

In addition, the First Use Tax appears to conflict directly with the authority of the Federal Energy Regulatory Commission to regulate the interstate sales and transportation of natural gas and the costs and rates of pipelines, under the Natural Gas Act of 1938, ch. 556, 52 Stat. 821-833, 15 U.S.C. 717-717w, and the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350.

Although we believe that the tax is unconstitutional and in conflict with supervening federal regulation, the operation of the tax pending a final determination of its validity imposes substantial administrative and regulatory burdens. The tax has required the Commission to devise procedures that will permit interstate pipelines to recover in their rates the additional costs resulting from imposition of the tax, but that will also attempt to ensure that consumers will be fully reimbursed for the amount of the tax passed on to them if it is ultimately held to be unconstitutional. The United States and the Commission are therefore interested in the prompt resolution of the issues presented in the complaint herein.

STATEMENT

1. The Louisiana First Use Tax on Natural Gas [1] imposes a volume tax of seven cents per thousand

---

[1] Act 294, 1978 La. Sess. Law Serv. 482 (West), to be codified as La. Rev. Stat. Ann. §§ 47:1301-47:1307 (West) (Mot. App. 1a-8a). Hereinafter, the various provisions of the act will be referred to by the section number to be used in the codification, and the act itself will be referred to as the "First Use Tax" or the "Act."

cubic feet (subject to certain exclusions), upon the first "use" within Louisiana of any natural gas that is not subject to any severance or production tax levied by Louisiana or any other state or territory of the United States, or is not subject to any import tax or tariff levied by the United States on imports from foreign countries. La. Rev. Stat. Ann. § 47:1303(A) (West) (Mot. App. 4a-5a). The term "use" is defined broadly as "[1] the sale; [2] the transportation in [Louisiana] to the point of delivery at the inlet of any processing plant; [3] the transportation in [Louisiana] of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; [4] transfer of possession or relinquishment of control at a delivery point in [Louisiana]; [5] processing for extraction of liquefiable component products or waste materials; [6] use in manufacturing; [7] treatment; [8] or other ascertainable action at a point within [Louisiana]." La. Rev. Stat. Ann. § 47:1302(8) (West) (Mot. App. 4a). The First Use Tax recites that it is "a cost associated with uses made by the owner in preparation of marketing of the natural gas[,]" (La. Rev. Stat. Ann. § 47:1303 (West)[2] and not a tax on the natural gas itself.[3] The First Use Tax also expressly

---

[2] La. Rev. Stat. § 47:1302(9) (West) (Mot. App. 4a) defines "owner" as "the person having title to and the right to alienate the natural gas subject to the tax at the time a use occurs [Louisiana]."

[3] The First Use Tax statute recites that it is not imposed "on the production, severance, or ownership of natural gas produced outside of the boundaries of the State of Louisiana

abrogates provisions of existing contracts which underlie and form the basis for certificates of public convenience and necessity issued by the Commission concerning the apportionment of taxes among sellers, processors, and purchasers of gas. See La. Rev. Stat. Ann. § 47:1303(C) (West) (Mot. App. 5a).

2. There are presently pending two separate proceedings involving the validity of the First Use Tax. *Edwin W. Edwards, et al.* v. *Transcontinental Gas Pipeline Corp., et al.*, 19th Judicial District Court, Louisiana, No. 216867, filed September 22, 1978, is an action by the Governor and other officials of the State of Louisiana responsible for administration of the tax, against some twenty-three pipelines and producers allegedly liable to pay it. The Louisiana officials seek a declaration that the tax is valid under the Federal Constitution.

The Federal Energy Regulatory Commission has also instituted proceedings challenging the First Use Tax in a United States district court. *Federal Energy Regulatory Commission* v. *McNamara, et al.*, M.D. La. Civil Action No. 78-384, appeal pending 5th Cir. No. 79-1403. On January 26, 1979, the district court entered an order staying proceedings before it pending the outcome of the state court declara-

---

* * * [and] that the incidence of this tax shall not be upon the natural gas nor upon the property or rights from which it is produced, but rather shall be only upon the privilege of performance or allowing the performance, by the owner of the enumerated actions comprising first use within [Louisiana]." La. Rev. Stat. Ann. § 46:1303(E) (West) (Mot. App. 6a).

tory judgment proceedings in *Edwin W. Edwards, et al.* v. *Transcontinental Gas Pipeline Corp., supra.* The district court's decision appears to have been based upon the abstention doctrine. The Commission has appealed (5th Cir. No. 79-1403), and oral argument is set for June 26, 1979.

It is probable that in the near future other actions challenging the validity of the First Use Tax will be filed in the Louisiana courts by interstate gas pipelines suing for recovery of amounts of the tax paid under protest. La. Rev. Stat. Ann. § 47:1576 (West). The Commission has authorized interstate pipelines to pass on in their rates the additional costs for natural gas which the pipelines incur as a result of the Louisiana First Use Tax. As a condition to this authorization, however, the pipelines are required to take all legal actions available to them to determine the constitutionality of the tax.[4]

The only statutory mechanism for challenging a state tax in Louisiana appears to be a suit for refund of the amounts paid under protest. La. Rev. Stat. Ann. § 47:1576 (West). Neither injunctive nor declaratory relief against collection of the tax is available. La. Rev. Stat. Ann. § 47:1575, § 47:1576 (West).

---

[4] *State of Louisiana First Use Tax In Pipeline Rate Cases,* Docket No. RM78-23, Order No. 10, 43 Fed. Reg. 45553 (1978); Order No. 10-A, 43 Fed. Reg. 60438 (1978), Order No. 10-B, 44 Fed. Reg. 13460 (1979), petitions for review pending *sub nom. Tennessee Gas Pipeline Co., et al.* v. *Federal Energy Regulatory Commission,* No. 78-3816 (5th Cir.).

DISCUSSION

The proposed complaint sets forth five causes of action: that the First Use Tax constitutes an unreasonable burden on interstate commerce (Compl. 16-21); that it conflicts with federal statutes regulating the interstate transportation and sale of natural gas (Compl. 21-23); that as applied to imported gas it violates the Import-Export Clause (Compl. 23-24); that it impairs the obligation of contracts (Compl. 25); and that it violates the Fourteenth Amendment by depriving the plaintiff States and their citizens the equal protection of the law (Compl. 25-26). The United States and the Commission believe that the Plaintiff States have standing, that the issues are appropriate for consideration by this Court in the exercise of its original jurisdiction, and that those issues are substantial.

1. The Plaintiff States Have Standing

The Plaintiff States allege that the Louisiana First Use tax injures them directly in their capacities as substantial consumers of natural gas; they also sue as parens patriae for their citizens who are also consumers of natural gas (Compl. 12-16; Pl. Br. 12-13).

Insofar as the plaintiffs are seeking to protect their own propriety interests, we believe their standing is clear. The complaint effectively alleges "that the injury for which [plaintiffs] seek[] redress was directly caused by the actions of another State." *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 663 (1976).

Although plaintiffs' propriety interest provide a sufficient basis for their standing, we believe that plaintiffs also have standing to sue as parens patriae for their citizens. It is well established that a state may bring an original action on behalf of its citizens "when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania* v. *New Jersey, supra,* 426 U.S. at 665. See also *Hawaii* v. *Standard Oil Co.,* 405 U.S. 251, 258 (1972). The complaint in this case satisfies that test.

This is not a case like *Pennsylvania* v. *New Jersey, supra,* where the plaintiff States were simply seeking refunds of taxes imposed by the defendant states on the citizens of the former, who could have themselves challenged the tax and sought their own refunds. The tax in this case is not imposed on the citizens of the complaining states, but its economic burden falls primarily upon them in the form of higher rates passed through to them by the tax-paying producers and pipelines. Yet, they have no practical remedy against the allegedly unconstitutional exaction; indeed, Louisiana permits challenges to the validity of its taxes only by way of refund suits by the direct taxpayer. Instead, this case is, in our view, closely analogous to *Pennsylvania* v. *West Virginia,* 262 U.S. 553, 591-592 (1923), in which the Court held that a state may bring an original action to enjoin the withdrawal of natural gas from interstate commerce by another state.

2. This Case is Appropriate For the Exercise of Original Jurisdiction

This Court should exercise its original jurisdiction in this case because it is the most appropriate forum for litigation of the issues. In *Arizona* v. *New Mexico*, 425 U.S. 794 (1976), this Court denied the State of Arizona leave to file a complaint against the State of New Mexico challenging the constitutionality of New Mexico's electrical energy tax. The Court did so for prudential reasons, relying on the fact that, in that case, a pending state court action provided an appropriate forum for the litigation of the issues presented for this Court's resolution. 425 U.S. at 797. There, however, the three Arizona utilities affected by the tax were able effectively to protect their and the State's interest by refusing to pay the tax, and bringing a declaratory judgment action in a New Mexico court challenging its validity on the constitutional grounds as those presented by Arizona in its original complaint. After the litigation in the state courts, this Court recently held that tax invalid. *Arizona Public Service Co.* v. *Snead*, No. 77-1810 (April 19, 1979).[5] Thus, within three years of this Court's decision, the matter was

[5] The Court ruled that the generation tax was invalid under the Supremacy Clause, and Section 2121 (a) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1914, 15 U.S.C. 391. This statute, enacted by Congress in the exercise of its power to regulate interstate commerce, prohibits the States from imposing a tax on the generation or transmission of electricity that imposes a greater tax burden on electricity consumed outside of the taxing State than in it.

definitely resolved without any substantial disruption of the rate structure to interstate consumers as a result of the tax.

This case stands in stark contrast, and very different prudential considerations support the exercise of jurisdiction. The population in some 30 gas consuming states will be subject to millions of dollars in additional charges while the validity of the First Use Tax is tested. Interstate pipelines subject to the tax have no option but to pay it. Louisiana law does not permit taxpayers to refuse payment and challenge the validity of taxes in declaratory judgment actions. See Statement, *supra*, page 7.[6] In consequence, effective May 31, 1979, the first payment of the tax became due. La. Rev. Stat. Ann. § 47:1305 (B) (West). In anticipation of this liability, the interstate pipelines subject to the tax requested the Federal Energy Regulatory Commission to devise procedures by which the tax could be passed on rates to their customers, subject to appropriate refund when the tax is ultimately to be unconstitutional. The Commission responded to this request by authorizing a "tracking procedure" permitting automatic passthrough of the tax, provided that the pipelines meet certain requirements intended to insure that consumers will be completely reimbursed upon the invalidation of the tax.[7] The conditions for reimbursement,

---

[6] The same principle applies under the Federal Internal Revenue Code. 26 U.S.C. 7421.

[7] See note 4, page 7, *supra*.

however, are being challenged by the pipelines in petitions for review of the Commission's orders. *Tennessee Gas Pipeline Co.* v. *FERC, et al.*, No. 78-3618 (5th Cir.).

Moreover, not only would this Court's declination of jurisdiction itself have significant consequences (unlike *Arizona* v. *New Mexico*, where no tax had been paid), but also none of the pending suits involving the constitutional validity of the First Use Tax is an appropriate vehicle for decision of the issues raised by the Plaintiff States. First, the state court declaratory judgment action by Louisiana officials (See Statement, *supra*, page 6) is in our view not maintainable under state law or reviewable by this Court under federal law. That suit appears to allege no legally cognizable injury by the named producer and pipeline defendants to the plaintiff officials. It raises the constitutionality of the First Use Tax only in anticipation of federal challenges to the tax that might be asserted by the defendant taxpayers in future refund actions. It is unlikely that such an action will lie under Louisiana law;[8] and it is even more doubtful that the declaratory judgment action presents an Article III case or controversy, since it appears essentially to request an advisory opinion. In these circumstances, it does not appear that review

---

[8] See *Louisiana* v. *Board of Supervisors*, 84 So.2d 597 (La. 1955); see also, *Edwards* v. *Parker*, 332 So.2d 175, 176, 180 (La. 1976); *Petition of Sewerage and Water Board of New Orleans*, 177 So.2d 276, 277-278 (La. 1965); but cf. *In re Gulf Oxygen Welder's Supply Profit Sharing Plan and Trust Agreement*, 297 So.2d 663 (1974).

of the ultimate decision of the Louisiana courts would be available in this Court. See *e.g.*, *Doremus* v. *Board of Education*, 342 U.S. 429, 434 (1952). *Muskrat* v. *United States*, 219 U.S. 346, 361-363 (1911). Cf. *Babbitt, Gov. of Arizona* v. *United Farm Workers National Union*, No. 78-225, June 5, 1979, slip op. 13-14.

Second, the action brought by the Commission against Louisiana officials responsible for administration and enforcement of the First Use Tax overlaps only some of the issues tendered in the original complaint.[9] Moreover, neither the Plaintiff States, their residents, nor anyone representing the same interests are parties to that action, and the Commission's interests with respect to the various issues (and its standing to raise them) are quite different from the interests of the Plaintiff States. At all events, the Commisison's action has been indefinitely stayed by the district court on abstention grounds pending the outcome of the declaratory judgment proceeding in the state courts.[10]

---

[9] The Commission seeks declaratory and injunctive relief on the ground that the tax interferes with the Commission's regulatory responsibilities under the Natural Gas Act and violates the Commerce Clause, impairs the obligations of contracts, is inconsistent with the import-export clause, and is invalid under the Supremacy Clause.

[10] While the Commission believes that the district court's stay of its action was improper, and is seeking reversal in the Fifth Circuit (*FERC* v. *McNamara, et al.*, No. 79-1403, scheduled for argument June 26, 1979) many months may pass before the court of appeals reaches its decision. Thereafter, if the Commission prevails, the case will have to be remanded to the district court to start again.

In sum, the prospects for prompt and decisive resolution of the issues presented in the complaint, without the prolonged imposition on consumers of very substantial additional costs, appear highly remote.[11] In these circumstances, we submit, the prudential considerations underlying the delination of jurisdiction *Arizona* v. *New Mexico* are inapplicable. The tax has already generated a cloud of complex litigation, none of which has even approached the merits. Many additional suits may be anticipated. Consumers are being subjected, while the litigation is in progress, to very substantial additional costs under a statute of highly doubtful constitutionality (see Pl. Br. 14-32). In our view, this case presents "a matter of grave public concern in which the state, as the representative of the public * * * has an interest apart from that of the individuals affected." *Pennsylvania* v. *West Virginia, supra,* 262 U.S. at 592.

---

[11] Moreover, the possibility that in the future refunds will reach those who bear the ultimate economic burden of the tax, is also dubious. Precisely because of these doubts, this Court has held that the refund remedy is an inadequate protection for consumers under the Natural Gas Act. See *e.g., Federal Power Commission* v. *Hunt,* 376 U.S. 515, 524-525 (1964); accord, *Federal Power Commission* v. *Tennessee Gas Transmission Co.,* 371 U.S. 145, 154-155 (1962).

CONCLUSION

For the reasons stated, the Court should grant the Plaintiff-States' motion for leave to file their complaint in this Court.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ROBERT R. NORDHAUS
General Counsel

HOWARD E. SHAPIRO
Solicitor
Federal Energy Regulatory Commission

JUNE 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 295122 7